

DANIEL MALAKAUSKAS, *Cal. Bar. No.*: 265903
MALAKAUSKAS LAW, APC
7345 South Durango Drive
Suite B-107-240
Las Vegas, NV 89113
Tel: 866-790-2242 / Fax: 888-802-2440
daniel@malakauskas.com

Attorney for Plaintiff: Meryl Pomponio

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MERYL POMPONIO,

Plaintiff,

v.

SAFEWAY, INC., as an entity and doing business
as "Safeway Store #1138", and DOES 1-50,
Inclusive,

Defendants.

Case No.:

**COMPLAINT BY MERYL POMPONIO
AGAINST SAFEWAY, INC., *et al.*, FOR
DAMAGES AND INJUNCTIVE RELIEF
RESULTING FROM VIOLATIONS OF 1)
TITLE III OF THE AMERICANS WITH
DISABILITIES ACT OF 1990; 2) THE UNRUH
CIVIL RIGHTS ACT; and 3) THE
CALIFORNIA DISABLED PERSONS ACT.**

[42 U.S.C. §§ 12101-12213; Cal. Civ. Code §§ 51,
52, 54, 54.1, 54.2 and 54.3.]

Comes now the Plaintiff, MERYL POMPONIO, (hereafter, "Ms. Pomponio" or "Plaintiff")
through her Attorney, DANIEL MALAKAUSKAS, 7345 South Durango Drive, Suite B-107-240, Las
Vegas, NV 89113; Telephone: (866) 790-2242; Facsimile: (888) 802-2440; who, having been denied
her civil rights, hereby respectfully alleges, avers, and complains as follows:

THIS COURT CAN GRANT JUSTICE TO A DISABLED INDIVIDUAL

COMPLAINT BY POMPONIO AGAINST SAFEWAY, INC., *ET AL.*, FOR DAMAGES AND INJUNCTIVE RELIEF

1 1. Mrs. Pomponio was disabled by her extreme medical condition: 1) Paraneoplastic
2 Syndrom. Due to Mrs. Pomponio's medical condition, Mrs. Pomponio is unable to walk and is
3 confined to using a mobility device to complete her day to day activities.

4
5 2. In 2018, and on two occasions in 2019, Ms. Pomponio was denied the full and equal
6 access to a public accommodation located at 1100 El Camino Real, Belmont, CA 94002.

7 3. Ms. Pomponio now asks that this Court stand up for her rights under the Americans with
8 Disabilities Act ("ADA"), the Unruh Civil Rights Act ("UCRA") and the California Disabled Persons
9 Act ("CDPA").
10

11 **THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA,**
12 **SAN FRANCISCO DIVISION, HAS JURISDICTION AND IS THE PROPER VENUE FOR**
13 **PLAINTIFF TO SEEK JUSTICE**

14 4. The United States District Court has original federal question jurisdiction over this action
15 pursuant to 28 U.S.C. § 1331 and § 1343(a)(3) and (a)(4), for violations of the Americans with
16 Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* This Court has supplemental jurisdiction over all state
17 claims, including, but not limited to, claims under the Unruh Civil Rights Act, Cal. Civ. Code § 51, *et*
18 *seq.*, and/or the California Disabled Persons Act, Cal. Civ. Code §§ 54-55.3, pursuant to 28 U.S.C. §
19 1367 as such acts not only expressly incorporate the Americans with Disabilities Act, but such state
20 law claims also arose from the same nucleus of operative facts or transactions.

21
22 5. Venue in this Court is proper under 28 U.S.C. § 1391(b)(2) as the claims alleged herein
23 arose in the Northern District, specifically at the real property located at 1100 El Camino Real,
24 Belmont, CA 94002.

25
26 6. The San Francisco Division of the Northern District of California is the proper division
27 because all claims herein arose at the real property located at 1100 El Camino Real, Belmont, CA
28 94002.

THE VICTIM AND THOSE RESPONSIBLE

7. Ms. Pomponio was disabled by her extreme medical condition: 1) Paraneoplastic Syndrom. Due to Mrs. Pomponio's medical condition, Mrs. Pomponio is unable to walk and is confined to using a mobility device to complete her day to day activities. Ms. Pomponio is therefore a "person with a disability" and a "physically disabled person" and has a "disability" or "medical condition" pursuant to the rules and regulations of the ADA, specifically 42 U.S.C § 12102 and Cal. Civ. Code §§ 51 and 54.

8. Defendants, SAFEWAY, INC., and Does 1-50 (hereafter, collectively or individually, "Tenant "), operate as a business establishment, hold themselves out to the public, and do business as "Safeway Store #1138" at 1100 El Camino Real, Belmont, CA 94002, and have substantial control over the interior and exterior of the building, the parking lot, and all spaces adjacent to such building.

9. Defendants, SAFEWAY, INC., and Does 1-50 (hereafter, collectively or individually, "Landlord", in their commercial real estate investment, owner, or landlord capacity), own, operate, manage, and have substantial control over the real property, including the interior and exterior of the building, parking lot and all spaces adjacent to the buildings located at 1100 El Camino Real, Belmont, CA 94002.

10. Defendants, Does 26-50, are individuals, businesses, organizations, or entities which entered into a contract with Defendants, Tenant, Landlord, and/or Does 1-50, as property managers or franchisees for the real property and adjacent parking lot, and as such have substantial control over the real property located at 1100 El Camino Real, Belmont, CA 94002.

11. The true names and capacities of the Defendants named herein as Does 1-50, inclusive, whether individual, corporate, partnership, association, or otherwise, are unknown to Plaintiff who

1 therefore sues these Defendants by such fictitious names. Plaintiff requests leave of court to amend this
2 complaint to allege their true names and capacities at such times as they are ascertained.

3 12. Plaintiff is informed and believes and thereon alleges that each of the Defendants,
4 including Does 1-50, caused and are responsible for the below described unlawful conduct and
5 resulting injuries by, among other things, personally participating in the unlawful conduct or acting
6 jointly or conspiring with others who did so; by authorizing, acquiescing in or setting in motion
7 policies, plans or actions that led to the unlawful conduct; by failing to take action to prevent the
8 unlawful conduct; by failing and refusing with deliberate indifference to Plaintiff's rights to equal
9 access to public spaces; and by ratifying the unlawful conduct that occurred by agents, and officers or
10 entities under their direction and control.
11
12

13
14 **MS. POMPONIO WAS DENIED EQUAL ACCESS TO A**
15 **PUBLIC ACCOMMODATION AND NOW FIGHTS FOR ALL DISABLED**

16 13. Ms. Pomponio was disabled by her extreme medical condition: 1) Paraneoplastic
17 Syndrome. Due to Mrs. Pomponio's medical condition, Mrs. Pomponio is unable to walk and is
18 confined to using a mobility device to complete her day to day. Mrs. Pomponio is therefore a "person
19 with a disability" and a "disabled person" and has a "disability" or "medical condition" pursuant to
20 federal law, rules and regulations, specifically 42 U.S.C § 12102, and 28 C.F.R. § 36.104.
21

22 14. In 2018 and on two occasions in 2019, Ms. Pomponio desired to go to and use the
23 services, and/or buy products at "Safeway Store #1138" which is located at 1100 El Camino Real,
24 Belmont, CA 94002.

25 15. While in the parking lot adjacent to, surrounding, or while inside the business "Safeway
26 Store #1138", Ms. Pomponio personally encountered barriers that interfered with her ability to use and
27 enjoy the goods, services, privileges and accommodations offered by the facilities. Specifically, on
28

1 three occasions while visiting the business establishment, Ms. Pomponio had difficulty as the alleged
2 accessible parking stall and access aisle had improper slopes making it more difficult for her to use her
3 wheeled mobility device. In addition, there were not enough accessible dining tables which deterred
4 Ms. Pomponio from eating inside the market.
5

6 16. Despite Ms. Pomponio's wish to patronize the businesses in the future, the above-
7 mentioned barriers constitute deterrents to access to the business, rendering the business' goods,
8 services, facilities, privileges, advantages, and accommodations unavailable to physically disabled
9 patrons such as herself.
10

11 17. Ms. Pomponio alleges, on information and belief, that Defendants knew that such
12 barriers existed and that Defendants' failure to remove the barriers was intentional as the particular
13 barriers mentioned above were intuitive and obvious. Additionally, Defendants exercised control and
14 dominion over the condition of the real property and building and had the financial resources to remove
15 such barriers. Furthermore, Ms. Pomponio alleges, on information and belief, that such modifications
16 were readily achievable as removal of the above barriers could have been achieved without much
17 difficulty or expense.
18

19 18. Ms. Pomponio brings this lawsuit to encourage Defendants to ensure their property is
20 accessible to all.
21

22 **FIRST CLAIM**
23 **VIOLATION OF TITLE III OF THE ADA**
24 **(As to all Defendants)**

25 19. Plaintiff hereby incorporates and realleges, as if fully set forth herein, each and every
26 allegation contained in all prior and subsequent paragraphs.

27 20. The parking lot and building at the real property known as 1100 El Camino Real,
28 Belmont, CA 94002 is owned, controlled, operated, leased, and managed by Defendants: Tenant,

1 Landlord, Does 1-50, or their agents. The business “Safeway Store #1138”, including their parking lot,
2 are open to the general public and as such is a “public accommodation” under 42 U.S.C. § 12181 and
3 28 C.F.R. § 36.104.
4

5 21. Pursuant to 42 U.S.C. § 12182(a), by owning, leasing, or operating the public
6 accommodation known as “Safeway Store # 1138”, Defendants are prohibited from discriminating
7 against Plaintiff by denying her, on the basis of her disability, the full and equal enjoyment of the goods,
8 services, facilities, privileges, advantages, or accommodations offered by the facilities.

9 22. In order to avoid discriminating against a disabled individual pursuant to 28 C.F.R. §
10 36.101 and § 36.102, Defendants must ensure that such public accommodation is designed, constructed,
11 and altered in compliance with the accessibility standards established by 28 C.F.R. § 36.101 *et seq.*,
12 and have proper policies, practices, and procedures to ensure that individuals with disabilities are
13 afforded equal access to the full and equal enjoyment of the goods, services, facilities, privileges,
14 advantages, or accommodations offered by the public accommodation. 42 U.S.C. §§ 12181(9),
15 12182(b)(2)(A)(iv) and (v), 12183(a)(1) and (2).
16
17

18 23. Ms. Pomponio was disabled by her extreme medical condition: 1) Paraneoplastic
19 Syndrome. Due to Mrs. Pomponio’s medical condition, Mrs. Pomponio is unable to walk and is
20 confined to using a mobility device to complete her day to day. Mrs. Pomponio is therefore a “person
21 with a disability” and a “disabled person” and has a “disability” or “medical condition” pursuant to
22 federal law, rules and regulations, specifically 42 U.S.C § 12102, and 28 C.F.R. § 36.104. While at
23 the interior, exterior, parking lot, or adjacent spaces, of the business known as “Safeway Store # 1138”,
24 Plaintiff personally encountered a number of barriers that interfered with her ability, to use and enjoy
25 the goods, services, privileges and accommodations offered at the facility.
26
27
28

24. Specifically, Defendants failed to ensure that such real property was equally accessible to individuals with disabilities and medical conditions by having the following barriers at the real property:

- a. The alleged existing unauthorized vehicle warning signage has noncompliant wording in violation of 2013 CBC 11B-502.8.2 and 2016 CBC 11B-502.8.2;
- b. The alleged unauthorized vehicle parking signage blank spaces are not filled in with appropriate information in violation of 2013 CBC 11B-502.8 and 2016 CBC 11B-502.8;
- c. The parking spaces and access aisles' slope exceeds two percent (2%) in violation of 1991 ADAAG 4.6.3, 2010 ADAS 502.4 Exception, 2013 CBC 11B-502.4 Exception and 2016 CBC 11B-502.4 Exception;
- d. The accessible parking spaces' length is less than two hundred sixteen inches (216") in violation of 2013 CBC 11B-502.2 and 2016 CBC 11B-502.2;
- e. Some van accessible parking space access aisles' width are less than eight feet (8") in violation of 1991 ADAAG 4.6.3, 2010 ADAS 502.2 Exception, 2013 CBC 11B-502.2 Exception, and 2016 CBC 11B-502.2 Exception;
- f. Tactile Exit signage is not provided in violation of 1991 ADAAG 4.1.3(16)(a), 2010 ADAS 216.4.1, 2013 CBC 11B-216.4.1 and 2016 CBC 11B-216.4.1;
- g. There are not enough accessible dining surfaces provided in violation of 1991 ADAAG 5.1, 2010 ADAS 226.1, 2013 CBC 11B-226.1, 2016 CBC 11B-226.1.

25. As a direct and proximate cause of Defendants' conduct, Plaintiff, on the basis of her disabilities, was denied the opportunity to participate in or benefit from a good, service, privilege, individuals in violation of 42 U.S.C. § 12181.

1 26. Plaintiff seeks injunctive relief to prohibit Defendants' acts and omissions as complained
2 of herein which have the effect of wrongfully discriminating against Plaintiff and other members of the
3 public who are physically disabled from full and equal access to these public facilities. Specifically,
4 Plaintiff seeks injunctive relief ensuring that Defendants modify their real property to ensure that
5 disabled persons are not discriminated against in receiving equal access to goods, services, and facilities
6 as other more able-bodied persons.
7

8
9 **SECOND CLAIM**
10 **VIOLATIONS OF CALIFORNIA CIVIL CODE § 51**
11 **(As to all Defendants)**

12 27. Plaintiff hereby incorporates and realleges, as if fully set forth herein, each and every
13 allegation contained in all prior and subsequent paragraphs.

14 28. Any violation of the ADA 42 U.S.C. §§ 12101-12213 also constitutes a violation of Cal.
15 Civ. Code § 51(f) and § 52(a), thus independently justifying an award of damages and injunctive relief
16 pursuant to California law.

17 29. On the basis of her disabilities, Plaintiff was denied the opportunity to participate in or
18 benefit from a good, service, privilege, advantage or accommodation in a manner equal to that afforded
19 to other non-disabled individuals which resulted in Plaintiff's difficulty, discomfort, or embarrassment.
20 Therefore, pursuant to Cal. Civ. Code § 55.56(a) through (c), Plaintiff is entitled to attorneys' fees,
21 costs, and damages of no less than four-thousand U.S. dollars (4,000 USD) for each and every violation.
22
23

24 **THIRD CLAIM**
25 **VIOLATIONS OF CALIFORNIA CIVIL CODE § 54**
26 **(As to all Defendants)**

27 30. Plaintiff hereby incorporates and realleges, as if fully set forth herein, each and every
28 allegation contained in all prior and subsequent paragraphs.

31. Any violation of the ADA 42 U.S.C. §§ 12101-12213 also constitutes a violation of Cal. Civ. Code § 54.1(d) and § 54.3(a), thus independently justifying an award of damages and injunctive relief pursuant to California law.

32. On the basis of her disabilities, Plaintiff was denied the opportunity to participate in or benefit from a good, service, privilege, advantage or accommodation in a manner equal to that afforded to other non-disabled individuals, which resulted in Plaintiff's difficulty, discomfort or embarrassment. Therefore, pursuant to Cal. Civ. Code § 55.56(a) through (c), Plaintiff is entitled to attorneys' fees, costs, and damages on no less than one-thousand U.S. dollars (1,000 USD) for each and every violation.

PRAYER

WHEREFORE, Plaintiff prays the following:

1. For injunctive relief directing Defendants to modify their facilities and policies as required by law to comply with ADA regulations, including the ADAAG where required; institute policy to enable Plaintiff to use goods and services offered to the non-disabled public; provide adequate access to all citizens, including persons with disabilities; issue a permanent injunction directing Defendants to maintain their facilities usable by Plaintiff and similarly situated person with disabilities in compliance with federal regulations, and which provide full and equal access, as required by law;

2. Retain jurisdiction over Defendants until such time as the Court is satisfied that Defendants' unlawful policies, practices, acts and omissions, and maintenance of inaccessible public facilities as complained of herein no longer occur and will not recur;

3. Award Plaintiff all appropriate damages, including, but not limited to, either statutory damages of no less than four-thousand U.S. dollars (4,000 USD) for each and every violation of Cal. Civ. Code § 51, or no less than one-thousand U.S. dollars (1,000 USD) for each and every violation of

1 Cal. Civ. Code § 54, with either Cal. Civ. Code § 51 or § 54 being elected prior to, or at, trial, but not
2 both, and general damages in an amount within the jurisdiction of the Court, according to proof;

3 4. Award Plaintiff all litigation expenses and costs of this proceeding, and all reasonable
4 attorneys' fees as provided by law, including but not limited to, 42 U.S.C. § 12205, Cal. Civ. Code §§
5 52 and 54.3; and
6

7 5. Grant such other and further relief as this Court may deem just and proper.

8 Dated: June 1st, 2019

9
10 /s/ Daniel Malakauskas
11 By: DANIEL MALAKAUSKAS, of,
12 MALAKAUSKAS LAW, APC,
13 Attorney for PLAINTIFF
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28